No. 75-1066

In the Supreme Court of the United States

OCTOBER TERM, 1975

RAUL DOMINGO SANTIAGO, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1066

RAUL DOMINGO SANTIAGO, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The four petitioners in these cases challenged the decisions of the Immigration and Naturalization Service requiring them to depart from the United States; the court of appeals consolidated the actions for *en banc* review since each raised the question—now presented in the joint petition for a writ of certiorari—"whether, on the particular facts of each, the action of an immigration officer in admitting an otherwise excludable alien estops the Government from asserting such excludability at entry as a basis for deportation" (Pet. App. ii). In our view, the decision below, rejecting the estoppel claims, is correct; the petition does not raise an issue of sufficient importance to warrant review by this Court since the cases largely turn on their particular facts; and there is no conflict among the courts of appeals. Accordingly, the petition for a writ of certiorari should be denied.

Three petitioners (Santiago, Paglinawan and Catam) are citizens of the Philippines; petitioner Khan is a citizen of Pakistan. Each had been granted an immigration visa pursuant to 8 U.S.C. 1153(a)(9)[1] as the spouse or child of a person who qualified for a preference visa under the terms of the Immigration and Nationality Act. See 8 U.S.C. 1153(a)(4), (5). By statute, the visa of each petitioner was valid only if he was "accompanying, or following to join, his spouse or parent" at the time of his entry into the United States. 8 U.S.C. 1153(a)(9).

Petitioners Santiago, Paglinawan and Catam were each married to women who qualified for a preference visa as married daughters of United States citizens. These three petitioners did not accompany or follow their wives to the United States as the statute required. Instead, each came alone.[2] The wives of petitioners Catam and Paglinawan stayed behind because of illness; petitioner Santiago's wife did not accompany him because they could not afford the transportation costs (Pet. App. iv-v). The immigration officers in Honolulu admitted each petitioner without inquiring into the whereabouts of his wife.

In respect to petitioner Khan, his father held a fifth preference visa as the brother of a United States citizen (8 U.S.C. 1153(a)(5)). Khan himself held a visa as a child "accompanying, or following to join" his father but this

---

[1]In pertinent part, 8 U.S.C. 1153(a)(9) provides:

> A spouse or child * * * shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa or to conditional entry under paragraphs (1) through (8) of this subsection, be entitled to the same status, and the same order of consideration provided in subsection (b) of this section, *if accompanying, or following to join,* his spouse or parent. [Emphasis added.]

[2]Petitioners' wives have not subsequently entered this country.

was valid only for one month, when Khan turned twenty-one (see 8 U.S.C. 1101(b)(1)). Apparently under the pressure of meeting the deadline, Khan left Pakistan without his father; when Khan arrived in New York the immigration officer asked about his father's whereabouts and, although Khan reported that his father was not with him and had not preceded him to the United States, the officer allowed Khan to enter (Pet. App. v). Unknown to Khan, while he was traveling to the United States his father died (*ibid.*).

Subsequently, after hearings, the Immigration and Naturalization Service determined that petitioners were excludable at the time of entry; they were given the choice of voluntarily departing from the United States or being deported (*id.* at iii). See 8 U.S.C. 1251(a)(1).[3] The Board of Immigration Appeals dismissed their respective appeals. (Petitioner Khan raised the estoppel issue on a motion for reconsideration, which the Board denied.)

In an opinion joined by nine judges, the court of appeals first rejected petitioners' argument that the words "accompanying, or following to join" in 8 U.S.C. 1153(a)(9) should be interpreted to mean "preceding with the hope [or expectation] of being joined later" (Pet. App. vi). In this Court, petitioners do not challenge this portion of the decision below (Pet. 2).

Petitioners also claimed that the government should be estopped from relying upon the fact that they were excludable at the time of entry. The court majority, discussing *Immigration and Naturalization Service* v. *Hibi,*

---

[3]8 U.S.C. 1251(a)(1) provides:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

414 U.S. 5, held that even if in some circumstances estoppel were available in an immigration case, there must be at least "affirmative misconduct" of a more serious nature and of more serious consequences than that involved in *Hibi* (Pet. App. x-xii). Finding no such misconduct, the court affirmed the decision of the Board of Immigration Appeals in each of these cases (*id.* at xii).

The dissenting judge, joined by three others, would have allowed petitioners Paglinawan and Khan to invoke estoppel; however, since it might have been that petitioners Santiago and Catam knew they were entering the country illegally (*id.* at xiii, n. 1; see also *id.* at iv-v), the dissenting judge would have remanded their cases for a determination of this issue (*id.* at xx).

1. There is no dispute that each petitioner is deportable under 8 U.S.C. 1251(a)(1), which provides that an alien who was "excludable" at the time of entry shall, upon order of the Attorney General, be deported. Petitioners suggest, however, that this provision should not apply to them since they were admitted when they should not have been. But this would render Section 1251(a)(1) a nullity: the provision itself is aimed at aliens, such as petitioners, who could have been excluded at entry but were not. Thus, under Section 1251(a)(1) the fact that petitioners entered although they could have been excluded serves not as a reason for barring their deportation, but rather as the very basis for requiring them to leave.

Petitioners appear to agree that the immigration officers who met them when they arrived in this country did not engage in "affirmative misconduct" (Pet. 11-12). In the cases of petitioners Santiago, Paglinawan and Catam, petitioners' complaint can only be that the officers should have inquired further to determine whether they were actually following their wives as the statute required.

With respect to them and petitioner Khan, their argument is in effect that because they were allowed to enter they must be allowed to stay. Section 1251(a)(1) provides to the contrary and petitioners have not suggested any reason why Congress should be forbidden from so regulating immigration.

As to the estoppel doctrine, petitioners state that "it is not susceptible to the adoption of hard and fast rules pertaining to its application" (Pet. 12) and they offer none.[4] Rather they suggest (Pet. 13) that this Court clarify the meaning of the phrase "affirmative misconduct" as used in *Immigration and Naturalization Service* v. *Hibi, supra,* 414 U.S. at 8-9, although as stated above, they appear to recognize that no affirmative misconduct occurred here. Since they point to no conflict among the courts of appeals on the question presented in this case, which even in petitioners' view turns on "the equities under the particular circumstances of each individual case" (Pet. 12), there is no reason to grant the writ.[5]

---

[4]Contrary to petitioners' assertion (Pet. 9), the court below did not rest its decision barring estoppel on whether the government was acting in a sovereign or proprietary capacity. Although the court alluded to such a possible distinction in immigration cases (Pet. App. vii-viii), it held that in the absence of 'affirmative misconduct," estoppel was unwarranted no matter what rule was applied (Pet. App. viii, x). Compare, *e.g., United States* v. *Wharton,* 514 F.2d 406, 409-413 (C.A. 9), where estoppel was invoked against the government acting in a sovereign capacity when "affirmative conduct" was found.

[5]In any event, the court below correctly held, that as compared with *Hibi,* these cases fall far short of justifying use of the estoppel doctrine even if it were available in a Section 1251(a)(1) deportation case (Pet. App. xi-xii):

> In *Hibi* there was a failure to "fully publicize" the citizenship rights of Filipino servicemen. The failures to inform of immigration requirements here do not appear to be more blameworthy than those in *Hibi.* Moreover, the Government officials in *Hibi*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

---

acted in derogation of duty while no duty to inform has been established in this case. If there was governmental "misconduct" here it is of a less serious nature than that in *Hibi*. Likewise the result of the government's failures here is less serious. Hibi lost his opportunity, granted by Act of Congress, to be naturalized as a United State citizen. Petitioners here have lost no rights to which they were entitled under the immigration laws. At the time of their admission, none had any right to enter. While it is true that the petitioners, other than Khan, might have been able to return to their homes and reenter accompanied by their wives if they had been informed by the immigration officer of the "accompany, or following to join" requirement, that officer's inaction did not directly deprive them of the opportunity to do so.